United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

640

No. 22,944

UNITED STATES OF AMERICA,

Appellee,

v.

MAURICE WINSLOW

Appellant.

Appeal from Judgment of the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

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STATEMENT OF ISSUES

Whether the Trial Court had jurisdiction to try Appellant upon an indictment where there was no evidence whatever before the Grand Jury of the acts and things which constituted the gist of the offenses charged.

The pending case has not previously been before this Court.

References to Rulings

No reference is made to any rulings by the District Court. In connection with this appeal appellant desires that the Court read the transcript of the grand jury proceedings (Grand Jury No. 1834-67) and the indictment in Criminal No. 66-68, Grand Jury No. 1834-67.

STATEMENT OF THE CASE

This is an appeal from a conviction for robbery, assault with a dangerous weapon, and unauthorized use of a vehicle pursuant to Title 22, District of Columbia Code, § 2901, 502 and 2204. The jurisdiction of this Court is founded on 28 USC 1291.

Maurice Winslow, appellant herein, Charles H. Robinson, appellant in No. 22,722, and Charles Wilson, Jr., appellant in No. 22,721,[1/] were arrested together on the night of November 30, 1967. On January 2, 1968, the grand jury met and an Assistant United States Attorney examined William E. Manning, one of the arresting officers. The officer's testimony (Grand Jury Tr.1-7) described the following: an automobile chase involving a reportedly stolen car during the course of which a radio report was received concerning a "holdup" at Peoples Drug Store, a resulting accident, the apprehension of the three suspects including a struggle between one of the suspects who allegedly was carrying a pistol and another officer Charles H. Cook, and the recovery of a quantity of narcotics, money, money orders, checks, miscellaneous property, and weapons from the car. The testimony of Officer Manning before the grand jury is approximately six pages in length and contains no details as to the specific Peoples Drug Store involved in the "holdup," the amount or value of any property stolen, from whom it was stolen, whether or not weapons were used by the holdup men, or any events transpiring during the "holdup" itself. On the same day a presentment was signed by the foreman of the grand jury. The presentment is recorded on a printed form which, after being filled in, read as follows:

1/ This appeal (No. 22,944) was consolidated with Nos. 22,721 and 22,722 by order of this Court on July 29, 1969.

> "We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do Present Charles Wilson, Jr., Charles Robinson, Maurice Winslow [for] Robbery, Assault with Dangerous Weapon, Assault on Member of Police Force with Dangerous Weapon, Unauthorized Use of Vehicle. Charles Robinson [for] Carrying Dangerous Weapon."

The record does not indicate that the grand jury as a body considered the case again. An indictment was drafted by the United States Attorney's Office, and was signed by the foreman of the jury under the traditional certification "A True Bill." The indictment, containing 17 counts, was returned on January 22, 1968. Each count described the offense alleged in such count. Six separate counts (1, 2, 5, 7, 9 and 11) charged all the defendants with robbery of a specified amount of money or property from six specific individuals (five employees of Peoples Drug Store and a customer) on the night of November 30, 1967. Seven separate counts (2, 4, 6, 8, 10, 12, 13 and 14) charged all of the defendants with assault with a dangerous weapon on seven specific individuals (six employees and a customer). One count (16) charged all three defendants with assault with a dangerous weapon on a police officer while engaged in the performance of his duty. One count (15) charged all of the three defendants with unauthorized use of an automobile and the last count (17) charged Robinson only with carrying a dangerous weapon.

Winslow, Robinson and Wilson were tried together on October 21-24, before Judge Aubrey E. Robinson, Jr., on their pleas of not guilty. On October 22, 1968, in the course of the trial the Court dismissed the sixth count of the indictment with respect to all three of the defendants and the sixteenth count of the indictment as to defendants Winslow and Wilson. On October 24, 1968, Winslow was convicted on six counts of robbery in violation of 22 D.C. Code, Section 2901, on seven counts of assault with a dangerous weapon in violation of 22 D.C. Code, Section 502, and on one

count of unauthorized use of a vehicle in violation of 22 D.C. Code, Section 2204. On March 14, 1969, the defendant was committed, pursuant to the provisions of Title 18 USC, Section 5010(c), the Federal Youth Corrections Act, for a period of 12 years on counts 1, 3, 5, 7, 9, and 11 (the robbery counts); 10 years on counts 2, 4, 8, 10, 12, 13, and 14 (the assault with a dangerous weapon counts); and 5 years on count 15 (the unauthorized use of a motor vehicle count); said committments to run concurrently.

ARGUMENT

THE TRIAL COURT LACKED JURISDICTION TO TRY APPELLANT ON A SEVENTEEN COUNT INDICTMENT WHEN THE GRAND JURY HEARD NO EVIDENCE ESTABLISHING THE PROBABLE GUILT OF THE APPELLANT CONCERNING AT LEAST FIFTEEN OF THE SIX-TEEN COUNTS APPLYING TO APPELLANT.

With respect to this point, appellant desires the Court to read the transcript of the grand jury proceedings and the indictment.

The Fifth Amendment provides that no one shall be held to answer, in the federal courts, for any "capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. Amend. V. The purpose of the grand jury investigation is to protect the accused against unfounded or malicious prosecutions by insuring that no criminal proceedings will be undertaken without a prior, disinterested determination of probable guilt. Orfield, Criminal Procedure From Arrest to Appeal, 144 (1947).

Winslow was charged by indictment with violation of Title 22, District of Columbia Code, § 2901, 502 and 2204. The indictment contained 17 counts, each alleging a separate offense, of which 16 counts[2/] applied to Winslow. As to 14 of the 16 counts applying to Winslow, there was no testimony adduced from the witness examined by the grand jury or any evidence whatever before the grand jury of the acts and things which constituted the gist of the offenses charged in those counts. As to at least one of the remaining two counts there was no evidence before the grand jury connecting Winslow with the offense charged. Albeit somewhat tedious this point can best be demonstrated by taking the defective

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2/ As previously noted in the statement of facts herein, two counts of the seventeen counts applying to Winslow were dismissed prior to the conclusion of the trial.

counts seriatim, and comparing them with the transcript of the grand jury proceedings.

The first count of the indictment alleged that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Warren M. Funkhouser, property of Peoples Drug Stores, Inc., of the value of $1,545.18. There was no evidence whatever presented to the grand jury of the offense charged in count one.

The second count of the indictment alleged that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Warren M. Funkhouser with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in count two.

The third count of the indictment alleged that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Stephanie V. Keyser, property of Peoples Drug Stores, Inc., of the value of $144.80. There was no evidence whatever presented to the grand jury of the offense charged in count three.

The fourth count of the indictment alleged that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Stephanie V. Keyser with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in count four.

The fifth count of the indictment alleged that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Mabel E. Swain, property of Peoples Drug Stores, Inc., of the value of about $2.15. There was no evidence whatever presented to the grand jury of the offense charged in count five.

The sixth count of the indictment alleged that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Mabel E. Swain with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in count six.

The seventh count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance by putting in fear, stole and took from the person and from the immediate actual possession of Martha Uzzell, property of Peoples Drug Stores, Inc., of the value of about $37.14. There was no evidence whatever presented to the grand jury of the offense charged in count seven.

The eighth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Martha Uzzell with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in count eight.

The ninth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from

the immediate actual possession of Richard B. Coughlin, property of Peoples Drug Stores, Inc., of the value of about $87.42. There was no evidence whatever presented to the grand jury of the offense charged in count nine.

The tenth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Richard B. Coughlin with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in count ten.

The eleventh count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Benoni Abbo-Offei, property of Benoni Abbo-Offei of the value of about $2.00. There was no evidence whatever presented to the grand jury of the offense charged in count eleven.

The twelfth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Benoni Abbo-Offei with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in count twelve.

The thirteenth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, assaulted Edward W. Carson with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in the thirteenth count.

The fourteenth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr.,

Charles Robinson and Maurice Winslow, assaulted Theodore Rainsford with a dangerous weapon, i.e., a pistol. There was no evidence whatever presented to the grand jury of the offense charged in the fourteenth count.

The sixteenth count of the indictment alleges that on or about November 30, 1967, within the District of Columbia, Charles Wilson, Jr., Charles Robinson and Maurice Winslow, without justifiable and excusable cause, did assault Charles H. Cook, a member of the Metropolitan Police Force, with a deadly and dangerous weapon, i.e., a pistol, while the said Charles H. Cook was engaged in the performance of his official duties. No evidence was adduced before the grand jury connecting Winslow with the offense charged in count sixteen.

It is the generally recognized rule that an indictment will be quashed, dismissed, or set aside by the Court where there is no evidence whatever before the grand jury tending to support the charges contained in an indictment, see Annotation: 59 ALR 567, or to support a separate, distinct, and essential element of the offense charged, see Annotation: 59 ALR 580.

The question of whether an indictment may be challenged on the ground that there was no rationally persuasive evidence whatsoever upon which to base it, has not been specifically decided by the United States Supreme Court. (See Annotation: 100 L. Ed. 411). Although Costello v. United States, 350 U.S. 359, 76 S Ct. 406, 100 L. Ed. 397 (1956) has been cited as establishing the rule that an indictment is not open to challenge in a federal court on the ground that it is not supported by adequate evidence, a careful reading of the decision demonstrates that such an interpretation is supported by nothing more than dictum. The Costello case was a government prosecution of great complexity under the

"net worth" method, resulting in a conviction for income tax evasion. The Court granted certiorari in Costello to consider a single question: "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted?" Consequently, Costello did not raise the question of whether the grand jury could properly indict where there was no evidence or the evidence before the grand jury was palpably insufficient to support the charges contained in the indictment. The distinction between the two is illuminated by Judge Burton in his concurring opinion wherein he noted that while the evidence presented to the grand jury was not "standing alone" technically competent "yet it was rationally persuasive of the crime charged, and provided a substantial basis for the indictment." Judge Burton then concluded:

> "To sustain this indictment under the above circumstances is well enough, but I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated.'"

The rule that an indictment will be quashed for want of any evidence supporting its charges was applied in at least one lower federal court decision. Brady v. United States (CA 8) 24 F 2d 405. In Brady the Court held that the trial court erred in denying the defendants the right to show in support of their motion to quash that there was no evidence whatever before the grand jury of the acts and things which constituted the gist of the offenses charged in the indictment. There the Court quoted with approval from People v. Price 6 N.Y. Crim Rep 141, 2 N.Y. Supp. 416, id 119 N.Y. 650, 23 N.E. 1149.

> "The grand jury found the pending indictment without any testimony connecting defendant with the Georgia conviction. In doing so they violated the well-settled rules of law. The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent subversive of the liberty of the citizen, and his safety and security, and the

> good name and fame of any innocent person might at any time be blasted."

Can Officer Manning's testimony before the grand jury, which contained only a hearsay report of a "holdup" at an unspecified Peoples Drug Store and contains no details as to the amount or value of any property stolen, from whom it was stolen, whether or not weapons were used by the holdup men or any events transpiring during the "holdup" itself, be seriously considered as "rationally persuasive of the crimes charged" and as providing "a substantial basis for the indictment."? Perhaps the government was in possession of sufficient evidence to provide an adequate basis for the indictment but such evidence was simply not presented to the grand jury. Perhaps too this indictment would not have been returned if the indictment procedure required by Rule 6 Fed. R. Crim. P. requiring the inclusion of the approval of the requisite 12 grand jurors had been followed. Gaither v. U.S., ___U.S. App. D.C. ___, ___ F 2d ___ (April 8, 1969). Rehearing granted and new opinion issued April 24, 1969, ___ U.S. App. D.C. ___, ___ F 2d ___.

A recent New Jersey case involved facts very similar to the facts in the case at bar. State v. Chandler, 236 A 2d 632 (1967). There it was established that a detective who was the sole witness who testified before the grand jury which indicted the defendant for murder, was neither an eyewitness to the crime nor in possession of "relevant information" concerning the alleged crime. The Court, citing State v. Donovan, 30 A 2d 421 (Sup. Ct. 1943), stated: "it plainly appears that this indictment, returned as it was without any evidence first received by the grand jury, was the product of misconduct."[3/]

3/ The Court in the Chandler case considered Costello v. U.S. supra, but distinguished it on the basis that Costello was concerned with the role of hearsay evidence in the grand jury hearing, not with the absence of any evidence logically probative of guilt.

The grand jury is charged to investigate the facts presented to it and to return indictments only if there is at least some logically probative evidence that an offense has been committed and reasonable ground to believe that those charged are guilty. By failing to hear evidence in support of the offenses charged, the grand jury abdicated its responsibilities and the indictment was returned in disregard of the appellant's valuable right not to be held to answer for a criminal offense, "unless on the presentment or indictment of a grand jury." As stated by Judge Burton in his concurring opinion in Costello v. United States, supra:

> " . . . it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Fundamental defects or omissions in an indictment cannot be waived by failure to raise them in some appropriate manner during the trial. This is so because the requirement that an indictment be free from fundamental defects or omissions is jurisdictional and the failure to so indict cannot be cured by a subsequent errorless conviction. United States v. Krepper 159 F 2d 958, 970. In 41 Am Jur 2d § 299 the general rule is stated to be that: "defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused." Moreover, a fundamental defect in an indictment cannot be cured "even with a defendant's consent." Crosby v. United States 118 U.S. App. D.C. 324, 339 F 2d 743 (1964).

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Pursuant to Rule 28(i) of the Fed. R. Appellate P. appellant adopts by reference the briefs of appellants in Nos. 22,721 (Wilson) and 22,722 (Robinson). Appellant would like to make the following observation

with respect to the footnote appearing on page 13 of the brief in No. 22, 722. Therein it is suggested that since Winslow's case was not involved in the "conflict" of alibies between Wilson and Robinson, there was no prejudicial joinder as to Winslow. The footnote was not necessary since it has no real relevance to Robinson's argument on prejudicial joinder. In any event the point as to Winslow's case is not well taken. Any prejudice flowing from the consolidation for trial of Wilson's and Robinson's cases must also have resulted in prejudice to Winslow. All three appellants were arrested together and the cases of all three must have been inextricably tied together in the minds of the jury. Consequently, any prejudicial testimony by one of the co-defendants would have necessarily affected all.

CONCLUSIONS

For the foregoing reasons the case should be remanded to the District Court with instructions to dismiss the indictment.

Respectfully submitted,

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August 12, 1969

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,944

UNITED STATES OF AMERICA,

Appellee,

v.

MAURICE WINSLOW,

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Appeal from Judgment of the United States District Court
For the District of Columbia

REPLY BRIEF FOR APPELLANT

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ARGUMENT

THE TRIAL COURT LACKED JURISDICTION TO TRY APPELLANT ON A SEVENTEEN COUNT INDICTMENT WHEN THE GRAND JURY HEARD NO EVIDENCE ESTABLISHING THE PROBABLE GUILT OF THE APPELLANT CONCERNING AT LEAST FIFTEEN OF THE SIXTEEN COUNTS APPLYING TO APPELLANT.

Appellant in his main brief contends that the evidence before the grand jury was palpably insufficient to support the charges contained in the indictment. The Government replies that the transcript of the grand jury testimony which has been made a part of the record on appeal*/ does not contain the testimony of two other witnesses that allegedly testified before the grand jury and that "there being other witnesses besides Officer Manning, the indictment must be considered valid because appellants have not clearly shown that it was not based upon sufficient evidence."

The Government does not state what the testimony of the other two witnesses, who allegedly testified before the grand jury, was, nor does it even allege that their testimony supplies the necessary evidence of the acts and things which constituted the gist of the offenses charged in the indictment. It follows that the Government has plainly failed to rebut the presumption of invalidity raised by the appellant concerning the indictment.

One other point deserves comment. The Government also states that the transcript of Officer Manning's grand jury testimony "does not purport to be a record of all that transpired before the grand jury and on

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*/ The transcript in Grand Jury No. 1834-67 was made a part of the record on appeal in No. 22,722 on July 2, 1969, by stipulation between counsel for appellant Robinson and the U.S. Attorney dated June 25 and filed June 26, 1969.

page one of the transcript the notation 'excerpt' is clearly visible in two places at the top of the page." The reporters notation "excerpt" however, does not necessarily carry any such connotation.**/ Rather the transcript on its face appeared to contain all the testimony relevant and material to the grand jury proceeding. If it does not, the Government should have at least specifically alleged as much and should not be permitted to circumvent appellant's argument on the bare allegation that two other unidentified witnesses also appeared before the grand jury.

CONCLUSION

For the foregoing reasons and those set forth in appellant's main brief, the judgment of the District Court should be reversed.

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October 2, 1969

**/ E.g., it would seem perfectly natural to omit non-essential items such as the opening remarks of the U.S. Attorney, etc.